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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1469

ERNEST W. LOHF, as Trustee in Bankruptcy of SUDLER, HART & CO., doing business as Sudler & Co.,

Petitioner,

AGAINST

THE TRAVELERS INDEMNITY COMPANY, an insurance company organized under the laws of the State of Connecticut,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ernest W. Lohf, as Trustee in Bankruptcy of Sudler, Hart & Co., petitions for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit (the "Court of Appeals") that affirmed the order of the District Court dismissing Petitioner's Complaint for indemnity upon a broker's blanket bond.

THE OPINIONS DELIVERED IN THE COURTS BELOW

The opinions delivered upon the rendition of the Judgment sought to be reviewed (Appendices, *infra,* at A-1, B-1, and C-1) were not reported.

GROUNDS UPON WHICH JURISDICTON IS INVOKED

The Judgment of the Court of Appeals affirmin Judgment of Dismissal of the United States District is dated and was entered December 27, 1973.

The Order of the Court of Appeals denying a Pe for Rehearing is dated and was entered on Januar 1974.

The jurisdiction of this Court is invoked und Stat. 928 (1948), as amended, 28 U.S.C. §1254(1 amended.

THE QUESTION PRESENTED FOR REVIEV

Whether the Court of Appeals in this removed, sity case failed to follow (a) controlling Colorado la the Rules of Decision Act, and (c) prior decisions o Court in holding that the trustee (Petitioner) of a rupt securities broker-dealer was precluded from i nity of fidelity losses under a broker's blanket bond because no sworn proof of claim was furnished insuror, notwithstanding that the insuror had resp to Petitioner's claim with a "blanket denial of cover

STATUTORY PROVISION INVOLVED

Rules of Decision Act, 62 Stat. 944 (1948), 28 §1652, as amended:

> "The laws of the several states, except whe Constitution or treaties of the United States o of Congress otherwise require or provide, sh regarded as rules of decision in civil actions courts of the United States, in cases wher apply."

[1] Appendix B at B-1.

STATEMENT OF THE CASE

This diversity action arises out of the bankruptcy of a Colorado corporation which, until its adjudication as a bankrupt on September 26, 1969, was engaged in business as a broker and dealer in securities in Colorado. R. Vol. IV at 32.[2] Within one year prior to the Bankrupt's adjudication, it sustained substantial losses ($684,143.68)[3] through fraudulent transfers of funds to its President. R. Vol. IV at 33. Prior to the transfers, Respondent, The Travelers Indemnity Company, had written and delivered in Colorado a broker's blanket bond (the "Bond") indemnifying the Bankrupt of and from certain losses, including losses caused by officers of the company through "dishonest, fraudulent, or criminal conduct." R. Vol. IV at 33 and 34. The Bond was in effect when the funds were fraudulently transferred. R. Vol. IV at 37, 171.

On September 25, 1970, after a detailed investigation (R. Vol. IV at 36), Petitioner gave written notice to Respondent claiming indemnification of itemized fidelity losses to the limits ($50,000) of the Bond.[4] R. Vol. IV at 36. On December 16, 1970, less than 90 days after the claim

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[2] The reference is to the Record (R), at page 32 of Volume IV, certified to this Court by the Clerk of the United States District Court for the District of Colorado.

[3] The sum referred to is the amount, excluding interest, of Petitioner's Judgment against the President of the Bankrupt for conveyances by the Bankrupt to him found to be fraudulent under Section 67 of the Bankruptcy Act (30 Stat. 564 (July 1, 1898), as amended, 11 U.S.C. §107). R. Vol. IV at 37. The judgment debtor filed his own petition in bankruptcy on January 12, 1973 (D.P.R., No. 3-73) and the collectibility of such judgment is doubtful.

[4] Appended to the demand for indemnification was a copy of Petitioner's Complaint against the President of the Bankrupt (R. Vol. IV at 144-166), filed in the United States District Court for the District of Colorado on the same day, which detailed 81 transfers of funds to the President of the Bankrupt by date and amount. R. Vol. IV at 36. Petitioner and representatives of Respondent met in November, 1970 to discuss Petitioner's claim, and all of the books and records of the Bankrupt were made available to Respondent. R. Vol. IV at 37.

was made, Respondent's representative denied liab on the Bond, stating (in full text):

> "On November 18, 1970, I personally delivered a of the Brokers Blanket Bond, Standard Form N together with copies of endorsements.
>
> "We have had occasion to review this matter and that the Bond in question was cancelled on Nove 4, 1969. Since no loss was sustained and discov prior to the cancellation date, it would not ap that The Travelers Indemnity Company has any ther liability under the Bond." R. Vol. IV at 17

Subsequently, Petitioner commenced this actio enforce the Bond in the Colorado courts. Responden moved the action to federal court (R. Vol. IV at 37) thereafter Petitioner's claim was determined upon a ulated Record. R. Vol. IV at 32-38. The District Cour reasons stated in its Opinion (Appendix C at C-5 - entered its Judgment of Dismissal of Petitioner's plaint on February 12, 1973. R. Vol. V at 376.

The Court of Appeals rejected the conclusions o relied on by the District Court for its decision, bu firmed the Judgment for reasons not considered i Opinion of the District Court. Appendix A at A-3 Court of Appeals' denial of indemnification was cated upon the ground that Petitioner had not satisfi policy conditions of liability solely because no sworn of claim had been filed as called for by the Bond (R IV at 41) and no excuse was offered for not so Appendix A at A-5.

On Rehearing, the Court of Appeals held that R dent's December 16 letter did not waive the policy sion calling for a sworn proof of claim, concludin

"The December 16 letter is a blanket denial of coverage; that is, coverage is denied under all the conditions of the bond including failure to furnish itemized proof of loss within ninety days after learning of such loss.'"[5] Appendix B at B-1.

Jurisdiction in the court of first instance was based upon 62 Stat. 930 (1948), 28 U.S.C. §1332.

REASONS FOR ALLOWANCE OF THE WRIT

THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE STATE LAW.

It is clear that fidelity losses were sustained and discovered by the Bankrupt and that, absent some viable defense not related to the fact of fidelity loss, the claim asserted by Petitioner for indemnity from Respondent would be payable. The Court of Appeals concluded that the absence of the filing of a proof of claim, notwithstanding that Respondent had given a "blanket denial of coverage",[6] was such a viable defense.

The Supreme Court of Colorado has consistently announced that the law of Colorado is that, where an insuror denies liability either absolutely or on specific grounds (other than failure to comply with a proof of claim provision), such insuror waives compliance with any policy provision requiring the filing of a proof of claim. The line of cases[7] so holding began ninety-seven years ago with the

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[5] The District Court earlier had agreed with counsel for Respondent that as a result of Respondent's denial of the claim Colorado cases applying the principle of waiver seemed to preclude the absence of proof of claim as a valid defense. R. Vol. I at 11.

[6] Appendix B at B-1.

[7] In accord with the cases quoted, *infra*, are **Jennings v. Brotherhood Accident Co.**, 44 Colo. 68, 96 P. 982 (1908); **National Mutual Fire Insurance Company v. Sprague**, 40 Colo. 344, 92 P. 227 (1907); and **Reliance Life Insurance Company v. Wolverton**, 88 Colo. 353, 296 P. 793 (1931).

general statement in *Hartford Insurance Co. v.* where the Supreme Court of Colorado stated:

> "[T]here must be a substantial compliance w terms of the policy in furnishing the prel proofs before the assured are entitled to any nity in case of loss, the authorities are agreed *the company waive the defects in the proofs, o the proofs altogether, by putting a refusal to other grounds.*" (Emphasis added.)

By 1907 the doctrine of waiver was so firml lished in Colorado that the Colorado Supreme C ferred to it as "well settled":

> "The refusal to pay in this case was not be the absence of this statement or proof of l because it was contended that the insured mated the amount of his loss, and, *having b refusal upon grounds other than the absenc preliminary proof, it is well settled that the was waived.*"[9] (Emphasis added.)

Similarly, in *Loyal Protective Insurance Co Huffington*[10] the Colorado Supreme Court said:

> "It is well settled that when an insurer deni ity, placing its repudiation on a definite grou than want of notice, proof of loss, or premat it waives the right to insist thereon [omitted]."

Subsequently, in 1934 the Colorado Supre made it clear that waiver is the result not only denial is based on grounds other than filing proo but also where the denial is categorical or absol

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[8] 3 Colo. 422, 425 (1877).
[9] **Hartford Fire Insurance Co. v. Hammond**, 41 Colo. 323, 687 (1907).
[10] 92 Colo. 209, 18 P.2d 1017, 1018 (1933).

> "[T]he insurance company defendant absolutely refused in any event to pay the loss to these plaintiffs which resulted to them by this fire, and thereby the insurance company waived compliance with the provision of the policy requiring notice of proof of loss."[11]

The latest and strongest statement by the Colorado Supreme Court on the waiver effected by a denial of liability by an insuror is found in *Federal Life Insurance Company v. Wells*:[12]

> "The only reason stated by the defendant, prior to the filing of the Answer, for denying liability and refusing to pay was the one stated in defendant's last letter, namely, that the claim does not come within the *coverage* of the policy. In basing its denial of liability and its refusal to pay upon that ground only, *the defendant waived the right to insist upon all other grounds of objection,* including failure to comply with the provisions concerning the time to give notice. [Citations omitted.]" (Emphasis added in part.)

The Court of Appeals recognized (Appendix A at A-5) that principles of Colorado law applicable to policies of insurance were equally applicable to fidelity bonds. The Court of Appeals has also recognized the principle here urged.[13]

The authorities relied on by the Court of Appeals for

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[11] **Home Ins. Co. of New York v. Taylor,** 94 Colo. 446, 32 P.2d 183, 184 (1934).

[12] 98 Colo. 455, 56 P.2d 936, 938 (1936).

[13] In **Sanderson v. Postal Life Ins. Co. of New York,** 87 F.2d 58, 60 (10 Cir. 1936), the Court of Appeals stated, ruling in a Colorado case without reference to what was then Colorado law:

> "The company [upon receiving the claim some fifteen years after the death of the insured] asserted that the policy had lapsed for non-payment of the annual premium due in 1915 and categorically denied liability under the paid-up provision, thus waiving any requirement for the submission of other or further proof of death."

the proposition that a blanket denial of coverage waives nothing and the filing of a formal proof of claim is nevertheless required unless some excuse is shown simply are not in point.[14] In none of the four cases relied upon by the Court of Appeals (except *Sanderson v. Postal Life Ins. Co. of New York*[15], where the insuror's categorical denial was held to have waived the filing of proof of death) is the insuror's blanket or erroneous denial of a claim an issue.[16] Each of the authorities so relied upon stands for the valid proposition that circumstances may excuse an insured (or his beneficiary) from providing a formal proof of claim—*none* say that such formality may not be waived by the insuror.

Petitioner submits that had he been permitted to proceed in state courts he would have prevailed on the legal principle at issue here. That rights enjoyed under state law should not vary according to whether their determination is made in a state or federal court was long ago recognized by the Congress [17] and this Court.[18] The holding of the Court of Appeals, if permitted to stand, will not only deprive Petitioner of his rights, but may also deprive

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[14] The rule that blanket denial (or a specific denial on grounds other than failure to file a proof of loss) of a claim on a policy effects a waiver of the requirement of filing proof of loss is based upon the common sense recognition that, where it is clear that the insurer will not pay in any event, it is absurd to require the insured to do acts which will prove useless. 14 **Couch on Insurance** §49:812 at 271-72 (2d ed. 1965). That a categorical denial results in waiver is the rule in the majority of the states (*ibid*, at §49:812) and was the federal common law rule (**Knickerbocker Life Insurance Co. v. Pendleton**, 112 U.S. 696 (1885)).

[15] *Supra*, n. 13.

[16] In **Barclay v. London Guarantee & Accident Co.**, 105 P. 865 (Colo. 1909), the insuror denied the claim on the specific ground that notice was late and the proof showed there was no excuse therefor. In **Celina Mut. Ins. Co. v. Berg**, 486 P. 2d 472 (Colo. App. 1971), the insuror never denied the claim and the insured, without excuse, rested too long upon his rights. In **Capital Fixture & Supply Co. v. National Fire Ins. Co.**, 279 P. 2d 435 (Colo. 1955), the insured had signed a non-waiver agreement which the Colorado Supreme Court enforced.

[17] Rules of Decision Act, *supra* at 2.

[18] **Erie R. Co. v. Tompkins**, 304 U.S. 64 (1938).

future insurance claimants, who seek to enforce their claims in the federal courts, of rights which would plainly be theirs in state courts. In 1972, the latest year for which statistics are available, more than $560,000,000 of direct insured losses were incurred in Colorado.[19] The decision below warrants review because the erroneously decided important question of Colorado law will inevitably arise again in federal courts.[20] "It is enough to say that the questions to be decided are those of state law and should have been determined according to the decisions of the state court."[21]

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[19] Barnes (Comm'r of Insurance), **Insurance Industry in Colorado, Statistical Report 1972**, at xi.

[20] This Court has heretofore disposed of matters similar to that raised here by the vacation of the judgment of the court of appeals with instructions to follow principles of law as announced by state courts. **Cf., New York Life Ins. Co. v. Jackson**, 304 U.S. 261 (1938), where certiorari was granted, the judgment of the Circuit Court of Appeals was vacated and the cause was remanded for further proceedings in conformity with **Erie R. Co. v. Tompkins**, *supra* n. 18.

[21] **Rosenthal v. New York Life Ins. Co.**, 304 U.S. 263, 264 (1938).

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 73-1254 NOVEMBER, 1973, TERM

ERNEST W. LOHF, as Trustee in Bankruptcy of Sudler, Hart & Co., d/b/a Sudler & Co.,
Plaintiff-Appellant,

v.

THE TRAVELERS INDEMNITY COMPANY, an insurance company organized under the laws of the State of Connecticut,
Defendant-Appellee.

(December 27,1973)

Appeal from the United States District Court for the District of Colorado
(D. C. No. C-3423)

William D. Scheid (John M. Law, on the brief), Denver, Colorado, for Plaintiff-Appellant.

Richard D. Greengard, Denver, Colorado, for Defendant-Appellee.

Before HILL, BARNES,* and SETH, United States Circuit Judges.

HILL, Circuit Judge.

In this diversity action, the trustee in bankruptcy for Sudler, Hart & Co. (Sudler) seeks indemnification from the Travelers Indemnity Company (Travelers) for losses arising out of fraudulent acts of Sudler's president, Rich-

* Of the Ninth Circuit, sitting by designation.

ard Kirby Hart (Hart). The district court for the District of Colorado, after viewing the exhibits and stipulated facts, rejected Sudler's demand for indemnification and accordingly dismissed the case.

The facts surrounding this case began on February 28, 1967, when Travelers issued a $50,000 broker's blanket bond (bond) to Sudler covering:

> Any loss through any dishonest, fraudulent or criminal act of any of the Employees, committed anywhere and whether committed alone or in collusion with others, including loss of Property through any such act of any of the Employees.[1/]

The bond expressly excludes any loss resulting directly or indirectly from the acts of members of the Board of Directors. The bond also terminates as to any Employee upon discovery by insured of any dishonest or fraudulent act on the part of such employee. For the bond to be operative, the insured must give Travelers written notice of any loss as soon as possible after the Insured learns of such loss, and file with Travelers an itemized proof of claim duly sworn to within 90 days after learning of the loss.

Between January 8, 1969, and September 26, 1969, while the bond was still in effect, Hart was the president of Sudler, its chairman of the board of directors and its record and beneficial owner of 98% of the corporation's issued and outstanding stock. After Sudler's filing of bankruptcy on September 26, Hart lost control of the corporation; and on October 30, 1969, a trustee was ap-

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1/ Definition of Employees—Wherever used in this bond Employee and Employees shall be deemed to mean, respectively, one or more of the officers, clerks and other employees while employed by the Insured during the currency of this bond, and wherever located and Guest Students pursuing their studies or duties in any of the Insured's offices.

pointed to manage the corporate affairs. The trustee instituted a detailed and thorough investigation of the bankrupt's affairs. From this investigation it was discovered that between January 8 and September 26, 1969, Sudler, at the direction of Hart, made eighty-one separate transfers of property aggregating $684,143.68 payable to Hart or for his account and benefit. None of these eighty-one transfers was made with fair consideration as that phrase is defined in § 67d of the Bankruptcy Act.

On September 25, 1970, the trustee sent Travelers a notice of claim for fidelity losses to the limits of its broker's blanket bond. Because the bond's coverage was limited to $50,000, the trustee demanded indemnification for only the last two fraudulent checks written by Hart. Travelers promptly denied any liability under the bond, and this lawsuit followed.

After viewing the stipulated facts and numerous exhibits the trial court determined that Traveler's liability for Hart's acts terminated upon discovery by Sudler of Hart's first fraudulent check which was written on January 8, 1969; as Sudler knew or should have known of the fraudulent transaction shortly after January 8, there was no coverage for the last two checks which were written on September 10, 1969. Liability was also denied because Hart was acting as a director when he perpetrated the frauds, and directors' acts are expressly excluded from coverage under the bond.

Although we affirm the dismissal of this action, we do it for reasons not considered in the court below. It was determined in the trial court that Hart was acting in his capacity as a director when he bilked the corporation of over $680,000. The trial court held that with Hart's domination of the company he was the board of directors and

his challenged acts must have been acts of a board mem since a functioning board would know of the acts would have been required to pass upon their propri We do not agree; although Hart was a director, he also Sudler's chief executive. As president he hand corporate affairs daily, which no doubt included auth izing the issuance of checks. Only in his capacity as pr dent could Hart require the corporation's employees write out eighty-one checks payable to himself or for benefit. To abscond with corporate funds over a ten-mo period without creditors and other interested par learning of this fact would require almost daily mani ation of corporate transactions and record books. Suc feat could only be perpetrated by an employee of the poration. We thus reject the lower court's conclusion Hart stole the money in his capacity as a corpo director.

Without question, the trustee did not follow all bond's terms when demanding indemnification. Sec three of the bond requires that "[t]he Insured shall to the Underwriter written notice of any loss under bond as soon as possible after the Insured shall lear such loss, and within ninety days after learning of loss shall file with the Underwriter an itemized proc claim duly sworn to." The earliest Travelers rece written notice of the loss was on September 25, 1970, the trustee sent Travelers a copy of the complaint he filed against Hart in an independent civil action. notice was given a year after the bankruptcy pet was filed and nearly eleven months after the trustee appointed. For some unexplained reason the trustee failed to submit an itemized proof of claim duly s to as required by the bond. Section three of the above quoted, certainly was not complied with.

Appendix A-5

Although Colorado courts have had few occasions to consider the status of proof of loss requirements under fidelity insurance contracts, we have found no evidence their interpretation of fidelity contracts would vary from the interpretation given other kinds of insurance contracts. The general rule is that proof of loss clauses should be construed liberally in favor of the insured. *See* London Guarantee & Accident Co. v. Officer, 242 P. 989 (Colo. 1925); C.R.S. 72-12-1 (1963). The Colorado courts do hold, however, that proof of loss may be a condition precedent to liability under an insurance policy. *See* Sanderson v. Postal Life Ins. Co., 87 F.2d 58 (10th Cir. 1936); Barclay v. London Guarantee & Accident Co., 105 P. 865 (Colo. 1909). In the case at bar, proof of loss was made a condition precedent; and where proof of loss is an express condition which must be given the insurer, failure to comply with the condition is failure to complete the contract unless a satisfactory excuse for noncompliance or delay is given. Celina Mut. Ins. Co. v. Berg, 486 P.2d 472 (Colo. App. 1971); Capitol Fixture & Supply Co. v. National Fire Ins. Co., 279 P. 2d 435 (Colo. 1955). The trustee has admitted he failed to comply with the proof of loss provision and has offered no reason for his failure to do so. For this reason the claim for indemnification must be denied.

Affirmed.

APPENDIX B

JANUARY TERM — JANUARY 24, 1974

No. 73-1254

Before Honorable Delmas C. Hill, Honorable Stanley Barnes*, and Honorable Oliver Seth, Circuit Judge (* Of the Ninth Circuit.)

ERNEST W. LOHF, as Trustee in Bankruptcy of Sudler, Hart & Co., d/b/a Sudler & Co.,

Plaintiff-Appellant,

v.

THE TRAVELERS INDEMNITY COMPANY, an insurance company organized under the laws of the State of Connecticut,

Defendant-Appellee.

Plaintiff-appellant's motion for rehearing urges our court failed to apply controlling Colorado law denying appellant recovery on an indemnity bond. Appellant argues that Travelers waived its right to an item proof of loss when, in a letter sent to the trustee December 16, 1970, it refused to pay on the sole ground that no loss had been sustained and discovered while policy was in effect. Appellant all along has argued waiver theory, and all along we have rejected it. December 16 letter is a blanket denial of coverage;

is, coverage is denied under all the conditions of the bond including failure to furnish an itemized proof of loss within ninety days after learning of such loss. As proof of loss was a condition precedent to liability under the bond, failure to comply with the condition was failure to complete the contract.

The petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk
By:
ROBERT L. HOECKER,
Chief Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COUR
FOR THE DISTRICT OF COLORADO

Civil Action No. C-3423

ERNEST W. LOHF, as Trustee in Bankruptcy of SUDLER, HART & CO., d/b/a SUDLER & CO.,

Plaintiff,

vs.

THE TRAVELERS INDEMNITY COMPANY, an insurance company organized under the laws of the State of Connecticut,

Defendant.

William D. Scheid and John M. Law, Attorne law, Western Federal Savings Building, Denver, Colo Attorneys for Plaintiff; Hemminger, McKendree, V & Elliott, by Richard O. Greengard, Attorney at Prudential Plaza, Denver, Colorado, Attorneys fo fendant.

(Filed February 7, 1973, Judgment entered February 12, 1973)

MEMORANDUM OPINION

WINNER, Judge

The parties have asked that this case be deter on a "stipulated record," and they have waived f trial. When a case is tried on "stipulated facts," t quirement of Rule 52 that there be findings of fact not apply. *Jones v. New York Central R. Co.* (19 Cir. 182 F. 2d 326. Whether that rule applies to a " lated record" is unclear, and, accordingly, this m andum opinion contains minimal fact findings, bu

agreed facts in the stipulated record are incorporated by reference to provide more detail.

The case was filed in a Colorado state court, and it was removed to this court because of diversity of citizenship of the parties. The court has jurisdiction under the provisions of 28 U.S.C. §1332.

Sudler, Hart & Co., d/b/a Sudler & Co. was a Colorado corporation which was formed in 1965. In 1967, defendant issued a $50,000.00 blanket bond indemnifying the corporation against specified losses resulting from dishonest, fraudulent or criminal acts of the company's employees. At least from January, 1969, the company was under the domination and control of R. Kirby Hart who was the actual or beneficial owner of 98% of the issued stock and who was both president and chairman of the board of the company. Between January 8, 1969, and September 26, 1969, Hart made 81 separate fraudulent transfers of funds aggregating $684,143.68, through the device of fraudulently paying himself corporate funds, as shown by the corporation's own books and records. The company was insolvent during this period of time, and the 81 transfers were dishonest, fraudulent or criminal within the bond's definitions. Most assuredly, Hart knew this.

We are concerned with two of the 81 checks, (a) a check for $48,000.00 dated September 10, 1969, paid by the bank September 11, 1969, and (b) a check for $12,000.00 dated September 10, 1969, paid by the bank September 15, 1969. Both checks were payable to Hart, and, as to these checks, defendant says in its brief, "Defendant concedes that the acts of Hart, in taking the $60,000.00 as above described, were 'dishonest, fraudulent or criminal,' as that phrase or the words thereof are used in the

bond." [Defendant stipulates to this in the agre
ord.] With that concession, defendant relies on ei
firmative defenses, pleaded as follows:

"FIRST AFFIRMATIVE DEFENSE

That the alleged loss sustained by the bankru
not sustained and discovered prior to the term
or cancellation of the Broker's Blanket Bon
inabove referred to as an entirety, and as such
an insured loss or is an excluded loss pursuan
terms of said Broker's Blanket Bond.

"SECOND AFFIRMATIVE DEFENSE

That the alleged loss sustained by the bankr
sulted directly or indirectly from the act or a
person or persons who were members of the B
Directors of the bankrupt or members of an
lent body, and as such is not an insured loss
excluded loss under the terms of such
Blanket Bond.

"THIRD AFFIRMATIVE DEFENSE

That the alleged loss of the bankrupt was th
either directly or indirectly of the act or a
person or persons acting in the capacity of a
of the Board of Directors of the bankrupt or
lent body and that such loss is not an insured
is an excluded loss pursuant to the terms
Broker's Blanket Bond.

"FOURTH AFFIRMATIVE DEFENSE

That the alleged loss sustained by the bankr
the result, directly or indirectly, of the act
committed by a person or persons not 'em
within the meaning of said Broker's Blanke
and that such loss is not an insured loss

excluded loss pursuant to the terms of said Broker's Blanket Bond.

"FIFTH AFFIRMATIVE DEFENSE

That the alleged loss sustained by the bankrupt was the result of the act or acts of an employee or employees of the bankrupt committed subsequent to the termination of said Broker's Blanket Bond as to such employee or employees and, as such, is not an insured loss or is an excluded loss pursuant to the terms of said Broker's Blanket Bond.

"SIXTH AFFIRMATIVE DEFENSE

That neither the bankrupt nor the plaintiff herein has, as required by the terms of said Broker's Blanket Bond, given written notice of the alleged loss under the Bond as soon as possible after discovery of the loss, nor within ninety (90) days after learning of such loss filed with the defendant an itemized proof of claim duly sworn to and is therefore barred and estopped to maintain the within action and has waived its right to maintain the within action.

"SEVENTH AFFIRMATIVE DEFENSE

That the bankrupt and the plaintiff herein have not brought an action or proceeding under said Broker's Blanket Bond in regard to the alleged loss sustained by the bankrupt within twenty-four (24) months after the date of discovery of such loss as required by the terms of said Broker's Blanket Bond and are therefore barred and estopped to maintain this action and have waived their right to maintain this action.

"EIGHTH AFFIRMATIVE DEFENSE

That plaintiff's Complaint fails to state a claim upon which relief can be granted."

Before discussing any of these overlapping defenses a few additional facts should be mentioned. On September 26, 1969, the company filed a voluntary petition in bankruptcy. Robert E. Watkins was appointed receiver on September 30, 1969, and plaintiff was appointed trustee on October 30, 1969. Not quite a year later, on September 25, 1970, plaintiff sued Hart and others. A copy of that complaint was mailed to defendant that same day.[1] On November 3, 1970, after receipt of the complaint against Hart, representatives of Travelers Indemnity met with plaintiff and his attorney, and those representatives were offered complete access to the company books and records. However, no sworn proof of loss has ever been filed by plaintiff, and no request for an extension of time within which to file such proof has ever been made. Following the November 3, 1970, meeting defendant, on December 16, 1970, wrote plaintiff:

> "On November 18, 1970, I personally delivered a copy of the Brokers Blanket Bond, Standard Form No. 14 together with copies of endorsements.
>
> "We have had occasion to review this matter and find that the Bond in question was cancelled on November 4, 1969. Since no loss was sustained and discovered prior to the cancellation date, it would not appear that The Travelers Indemnity Company has any further liability under the Bond."

It is on this letter that plaintiff rests his claim of waiver by defendant of all of the foregoing affirmative defenses. It is a little difficult to follow plaintiff's argument, but it seems to boil down to a contention that the brief letter of December 16, 1970, was an intentional or

(1) In that case, on November 8, 1972, this court entered a default judgment against Hart for $684,143.68, plus interest, and it was found that the 81 transfers involved were fraudulent. The case remains pending as to other defendants.

implied waiver of all defenses, other than the defense of date of loss and its discovery. Defendant's witnesses testified in effect that the intent of the letter was to say only that no covered loses were sustained and discovered, and that there was no intent to waive other defenses. We think that it takes a strained reading of the December 16, 1970, letter to arrive at any conclusion that it constitutes a waiver of manifestly valid defenses under the bond—defenses which plaintiff at least tacitly admits are perfectly good unless this faint claim of waiver can be sustained. Plaintiff relies on *Federal Life Ins. Co. v. Wells* (1936) 98 Colo. 455, 56 P. 2d 936, to support his argument that there was a waiver. The case is inapposite. What was there involved was a waiver of the requirement for filing of notice after the company had denied coverage. Under the controlling affirmative defenses, we are not dealing with any notice requirement; rather, we are dealing with denial of coverage. Our attention has not been called to, and we are not familiar with a case which says that where coverage is denied, the insuror cannot assert any defense it has which goes to the question of coverage. Defendant's witnesses have testified that the letter was intended as a blanket denial of coverage, and we so read the letter, but if the letter can be said to be ambiguous, the testimony establishes that this was its intent.

Judge Huxman said in *Phillips v. Lagaly* (1954) 10 Cir. 214 F. 2d 527, "Waiver is the intentional relinquishment of a known right." Waiver is not lightly implied, and it is settled Colorado law that, "the coverage or restrictions on the coverage, cannot be extended by the doctrine of waiver or estoppel." *Hartford Livestock Insurance Company v. Phillips* (1962) 150 Colo. 349, 372 P. 2d 740. See, also: *Reliance Insurance Co. v. The Escapade* (1960) 5 Cir. 280 F. 2d 482, *Reisman v. New Hampshire*

Fire Insurance Co. (1963) 5 Cir. 312 F. 2d 17. Certainly the elements necessary to a claim of estoppel to set up the defense of lack of coverage are not present. *Glen v. State Farm Mut. Ins. Co.* (1965) 10 Cir. 314 F. 2d 5; *Helvering v. Schine Chain Theaters* (1941) 2 Cir. 121 F. 2d 948, *Bach v. Perkins* (1955) 9 Cir. 223 F. 2d 251.

Plaintiff does not seriously contend that defendant does not have valid defenses to this case if those defenses have not been waived, and, accordingly, we do not devote much discussion to the sufficiency of the defenses, and we comment only briefly in support of our conclusion that having found no waiver, plaintiff has proven no right to recover.

The bond said:

> "This bond shall terminate as to any Employee— (a) immediately upon discovery by the insured of any dishonest or fraudulent act on the part of such Employee . . . ."

This provision is pretty much standard in all fidelity bonds and it is reasonable, necessary and enforceable *United States Fidelity and Guaranty Co. v. Oklahoma* (1930) 10 Cir. 43 F. 2d 532; *J. S. Fraering Inc. v. Employers Mutual Liability Co. of Wisconsin* (1957) 5 Cir. 242 F. 2d 609. Taking into account Hart's domination of the company, the insured corporation had knowledge of Hart's actions .It "discovered" his dishonesty when he wrote the first fraudulent check on January 8, 1969, and this is especially true when his dishonest actions were reflected in the company's books and records. *Curtis v. Connly* (1921) 257 U.S. 260. Thus, under the express provisions of the bond in suit, it terminated long before the fraudulent checks with which we are here concerned were written. There was no coverage when the September

1969, checks were written, because the earlier dishonest acts ended the bond's coverage. A contrary holding would mean that a corporation under the domination of a dishonest person would be afforded coverage not given to a corporation with honest management which had knowledge of dishonest acts on the part of an employee.[2]

Moreover, Hart was acting as a director in perpetrating the frauds complained of, and director's acts are expressly excluded from coverage under the bond.[3] With his domination of the company, he was the board of directors and his challenged acts were acts of a board member within the bond's meaning, because a functioning board would know of the acts and would have been required to pass upon their propriety.

In summary, then, we hold that the letter of December 16, 1970, written by one of defendant's assistant claims supervisors, was not a waiver of available defenses of lack of coverage. It defies credulity to think that "no coverage" defenses were intended to be waived or were waived by that letter. Defendant had not at that time investigated the facts, and its later investigation established beyond peradventure that as to the claims on which this complaint is founded, the bond terminated because of Hart's prior dishonest acts which were necessarily known to him and he was the corporation, even if the books and records of the company did not disclose the fraud [and they did.][4] The corporation was charged with knowledge of this first

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[2] To avoid this inevitable conclusion, plaintiff relies on a single 1899 case from England, **Caston and Arrington Union v. Dew** (Q.B.) 80 L.T.R. 325. The case is not in point, and not a single case from the United States is cited by plaintiff.

[3] The bond excludes coverage of "any loss resulting directly or indirectly from the act or acts of persons while acting in the capacity of a member [of the Board of Directors.]"

[4] It took months of investigation by plaintiff to dig out the facts, and there is no way defendant can be charged with knowledge when the December 16, 1970 letter was written.

defalcation, and the bond's coverage terminated as to Hart with his first dishonest act.

Plaintiff cannot go back to the earlier misappropriations because the case was not filed within the permissive time limits as to them, and plaintiff limits his claim to the two September checks, and he acknowledges that he has no claim on any earlier checks.

We hold that plaintiff cannot recover on those two checks, and we direct that judgment enter in favor of defendant and against plaintiff. Defendant is awarded its costs.

Dated at Denver, Colorado, this 5th day of February 1973.

United States District Judge

FILED
APR 30
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1469

ERNEST W. LOHF, as Trustee
in Bankruptcy of SUDLER, HART & CO.,
doing business as Sudler & Co.,

Petitioner,

AGAINST

THE TRAVELERS INDEMNITY COMPANY,
an insurance company organized under the
laws of the State of Connecticut,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT COURT

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THE QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals in this diversity case failed to follow (a) controlling Colorado law, and (b) prior decisions of the Supreme Court of the United States in holding that the trustee of a bankrupt securities broker-dealer was precluded from indemnity of fidelity losses under a broker's blanket bond because (1) no sworn proof

of claim was furnished to the insuror, and (2) the
did not waive its right to a sworn proof of claim
there a waiver of any other bond conditions, notwit
ing that the insuror responded to the trustee's cla
a blanket denial letter.[1]

STATEMENT OF THE CASE

In this diversity action[2] the trustee in bankru
Sudler, Hart & Co.[3] seeks indemnification from Th
elers Indemnity Company[4] for losses arising out
fraudulent, dishonest or criminal acts of Sudler'
dent, Richard Kirby Hart. Such indemnification is
pursuant to the issuance in 1967 by Respondent
tioner of an indemnity bond assertedly covering, *in*
the aforementioned acts.[5]

The developed factual record would reflect th
its adjudication as a bankrupt on September 2
Petitioner was engaged in business in Colorad

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[1] Respondent would respectfully restate Petitioner's Ques
sented for Review because in its Order upon the pe
rehearing the Tenth Circuit Court of Appeals stated quit
tically that:

> Appellant [Petitioner herein] all along has argued
> waiver theory, and all along we have rejected it.
> December 16 letter is a blanket denial of coverage;
> **is, coverage is denied under all the conditions of**
> **bond including failure to furnish an itemized proo**
> **loss . . .** (Emphasis added)

See Appendix B at B-1, B-2, Petitioner's Petition for
Certiorari [hereinafter all references to matters contained
tioner's Appendix will be cited as Appendix].

[2] This instant action was commenced in the District Court
Colorado on September 10, 1971. Upon Respondent's mo
suit was removed to the United States District Court
District of Colorado. 62 Stat. 930 (1948), 28 U. S. C. Sec. 1

[3] Hereinafter sometimes referred to as Petitioner or Sudl

[4] Hereinafter referred to as Respondent.

[5] However, the issued bond "expressly excludes any loss
directly or indirectly from the acts of members of the
Directors." Appendix at A-2. In this regard, "Richard K
was the actual or beneficial owner of 98% of the issu
and was also the "president and chairman of the board"
Hart & Co. Appendix at C-2.

registered securities broker and dealer. Upon subsequent examination into the affairs of Sudler by the appointed trustee in bankruptcy, it was discovered that between January 8 and September 26, 1969, the bankrupt sustained losses ($684,143.68) through the dishonest, fraudulent or criminal conduct of Sudler's president.

On September 25, 1970, Petitioner first gave written notice to Respondent of losses claimed to be covered under and to the limits of the bond.[6] Respondent, by letter dated December 16, 1970, denied any liability under such bond. The factual posture would further reflect that Petitioner has not, to this date, submitted an itemized proof of claim duly sworn to; nor has Petitioner requested an extension of time within which to file such proof of claim; nor has Petitioner compiled with other pertinent bond terms.[7]

The District Court upon a stipulated record entered a Judgment of Dismissal in Respondents's favor. In its opinion denying liability the trial court specifically found "that the letter of December 16, 1970, written by one of

---

[6] "Because the bond's coverage was limited to $50,000 the trustee demanded indemnification for only the last two fraudulent checks written by Hart." Appendix at A-3.

[7] The Tenth Circuit Court of Appeals found that:

> **Without question, the trustee did not follow all the bond's terms when demanding indemnification.** Section three of the bond requires that '[t]he Insured **shall give to the Underwriter written notice of any loss** under this bond as soon as possible after the Insured shall learn of such loss, and within ninety days after learning of such loss shall file with the Underwriter an itemized proof of claim duly sworn to.' The earliest Travelers received written notice of the loss was on September 25, 1970, when the trustee sent Travelers a copy of the complaint he had filed against Hart in an independent civil action. This notce was given a year after the bankruptcy petition was filed and nearly eleven months after the trustee was appointed. For some unexplained reason the **trustee also failed to submit an itemized proof of claim duly sworn to as required by the bond.** Section three of the bond, above quoted, certainly was not complied with (Emphasis added)
>
> **Appendix at A-4.**

defendant's assistant claims supervisors, was not a waiver of available defenses of lack of coverage."[8]

On appeal, the Tenth Circuit Court of Appeals affirmed the dismissal by the trial court, but did so for "reasons not considered in the court below."[9] The Court of Appeals only rejected "the lower court's conclusion that Hart stole the money in his capacity as a corporate director,"[10] while holding that Petitioner failed to comply with certain pertinent conditions precedent under the terms of the bond.

In its order denying the petition for rehearing, the Court of Appeals dismissed Petitioner's waiver theory based on the December 16, 1970, letter stating "Appellant all along has argued this waiver theory, and all along we have rejected it."[11] The Court of Appeals was also clear in pointing out that Respondent had denied coverage "under all the conditions of the bond including failure to furnish an itemized proof of claim within ninety days after learning of such loss."[12]

ARGUMENT

THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE IS ENTIRELY CONSISTENT WITH THE LAW AS ANNOUNCED IN THE STATE OF COLORADO

At the outset, Respondent strongly submits that the present case is not a proper matter for review since the Court of Appeals' decision was not rendered in contra-

[8] *Id.* at C-8. *See also* 16 Appelman, Insurance Law and Practice, Sec. 9083; Couch on Insurance, 2ed., Sec. 71:22.

[9] *Id.* at A-3.

[10] *Id.* at A-4. *Compare,* **Frank Gardner Hardware & Supply Co. v. St. Paul Fire & Marine Ins. Co.** 245 Miss. 321, 48 S.2d 190 (1963).

[11] *Id.* at B-1.

[12] *Id.* at B-2

diction of established Colorado law.[18] In fact, the instant opinion clarifies and reiterates the propriety of Colorado law on the matter.

The main thrust of Petitioner's argument again centers around his propounded waiver theory. In other words, Petitioner is saying that Respondent excused the trustee from filing a proof of claim when Respondent waived its right to performance. Petitioner misplaces his emphasis by ignoring the findings of the Court of Appeals and the District Court.

A.

First, the trial court considered Petitioner's claim of waiver; elicited testimony on the issue; developed the factual posture and coupled with the stipulated record stated:

> It is on this letter that plaintiff rests his claim of waiver by defendant of all of the foregoing affirmative defenses. It is a little difficult to follow plaintiff's argument, but it seems to boil down to a contention that the brief letter of December 16, 1970, was an intentional or implied waiver of all defenses, other than the defense of date of loss and its discovery. Defendant's witnesses testified in effect that the intent of the letter was to say only that no covered losses were sustained and discovered, and that there was no intent to waive other defenses. *We think that it takes a strained reading of the December 16, 1970, letter to arrive at any conclusion that it constitutes a waiver of manifestly valid defenses under the bond—defenses which plaintiff admits are perfectly good* unless this faint claim of waiver can be sustained. Plaintiff relies on *Federal Life Ins. Co. v. Wells*

[18] Rule 19 1.(b), Sup. Ct. R.

(1936) 98 Colo. 455, 56 P.2d 936, to support his argument that there was a waiver. This case is inapposite . . . . (Emphasis added)[14]

The trier of fact, in this instance the trial court, determined, upon the evidence, that there was no waiver as claimed.[15] *It was specifically found that Respondent did not deny liability on one ground to the exclusion of other valid defenses.*[16] In this light, denial of Petitioner's waiver theory is totally consistent with Colorado law.

B.

Secondly, although the Court of Appeals did not specifically mention the failure of Petitioner's waiver theory in its opinion, due consideration by the court was obviously given to that issue. This is amply evidenced by the Appellate Court's pronouncement in its Order denying the petition for rehearing.[17] The court was clear in saying

---

[14] Appendix at C-5-C-6.

[15] In **Capitol Fixture & Supply Co. v. National Fire Ins. Co.**, 131 Colo. 64, 68, 279 P 2d 435, 437 (1955), a case relied upon by the Court of Appeals, the Colorado Supreme Court stated that:

> The trial court found, and there is no evidence to support any other finding, that, 'The insurance company **has not by its conduct, or otherwise, waived full compliance by the policy holders of all conditions** of the policies.' (Emphasis added)
>
> • • •
>
> The Court also said that:
>
> The submission of proof of loss within sixty days from the inception of the loss is a specific provision of the policy; is a condition precedent to liability on the part of the insurer; and it is the generally accepted rule that the failure to comply wih such requirements within the stipulated time does not void the policy, provided a satisfactory excuse for noncompliance or the delay is given.

[16] Petitioner cites numerous Colorado cases which allegedly substantiate his position. *See* Petitioner's Petition, n. 8-12. However a close reading of those opinions strengthens Respondent's case. In each of the cited cases, the insurance carrier denied liability on certain grounds to the exclusion of otherwise valid defenses. *See e.g.*, **Federal Life Insurance Company v. Wells**, 98 Colo. 455, 56 P 2d 936, 938 (1936), wherein a waiver was effectuated because the court found that the carrier had based its denial of recovery upon one ground only.

[17] *Supra*, n.1.

that liability was "denied under all the conditions of the bond including failure to furnish an itemized proof of loss . . . ."[18]

As Petitioner points out, the authorities relied upon by the Court of Appeals do clearly reflect Colorado law in that "circumstances may excuse an insured from providing a formal proof of claim."[19] Here, *without question* there was no excuse, nor was one proffered, for the Petitioner's failure to comply with the proof of loss provision. In fact, "the trustee has admitted he failed to comply"[20] with that contractual provision.

However, contrary to Petitioner's stand, those authorities also indicate that contractual provisions may be waived. But a waiver to be effective must come within the parameters established by the law of Colorado.[21] Without belaboring the point, it further appears to Respondent that Petitioner has ignored the factual findings, which evidenced that no waiver was effectuated in this suit in order for the conditions precedent to be abrogated.

Respondent contends that the Court of Appeals properly and fairly applied the law of Colorado in this action. The decision reached was consistent with and based upon state law; wherefore, Petitioner has failed to show sufficient cause why this matter should be reviewed by this Court.

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[18] Appendix at B-2.

[19] Petitioner's Petition at 8. *See* also Appendix at A-5.

[20] Appendix A-5.

[21] *See* n. 15 and 16, *supra*. *See* also **Boaz v. Order of Commercial Travelers of America**, 69 Colo. 44, 168 P. 1178, 1179 (1917), wherein the Colorado Supreme Court stated:

> The doctrine of waiver is based upon the manifest injustice of permitting a party by his acts to mislead another, so that the latter is induced to assume the expense and labor of the trial of an issue tendered, and then be met with a plea that because of something done, or omitted to be done, of which the first party all the time had knowledge, such issue is wholly immaterial.

See also **Hartford Livestock Insurance Co. v. Phillips**, 150 Colo. 349, 372 P.2d 740 (1962).

CONCLUSION

For the reasons set forth herein, Respondent res
fully requests that the Petition for Writ of Certiora
denied.

Respectfully submitted

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FILE COPY

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1973

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Respondent.

REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner submits this Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari pursuant to Paragraph 4 of Rule 24 of this Court.[1]

ARGUMENT

Petitioner posed one singular question for review by this Court — whether the Court of Appeals' holding that,

[1] References and abbreviations used in this Reply are the same as those used in the Petition for Writ of Certiorari.

notwithstanding Respondent's absolute denial
tioner's claim, Petitioner was precluded from
under a Bond issued by Respondent *solely* b
proof of claim was furnished to the insuror wa
to applicable law. Respondent restated both the
Presented and a portion of the Statement of
apparently arguing that waiver of additional p
ditions is involved.

While the Court of Appeals states that
letter does not waive any Bond condition, it is
fact that no proof of claim was filed which led it
indemnity.[2] The Court of Appeals refers to no ot
condition as controlling its decision.[3] *In Home
of New York v. Taylor*[4] the Supreme Court of
decided the question presented by Petitioner
that, where no proof has been filed with the insu
absolutely refuses in any event to pay (*i.e.*,
denial), the insuror waives compliance with the
loss requirement. No authority cited by eithe
Courts below or by Respondent is to the contr

Quoting extensively from the District Court'
Respondent argues that the District Judge f
under Colorado law Respondent's letter denying
er's claim did not waive compliance with the
claim condition of the Bond. That Court did n
or conclude.[6] Indeed, the District Court, at mot

[2] Appendix B at B-2.

[3] The Court of Appeals appears to criticize Petitioner for
of claim eleven months after his appointment (Appendix
but does not rule that his claim was late. The District
citing *Federal Life Ins. Co. v. Wells*, 98 Colo. 455, 5
(1936), expressly held that it was "not dealing with
requirement." Appendix C at C-5. That Court noted th
of claim had been delivered (*id.*, at C-4) and was silen
effect of that fact.

[4] 94 Colo. 446, 32 P. 2d 183-184 (1934).

[5] Brief in Opposition at 5-6.

[6] See n.3, *supra*.

indicated that Respondent's defenses related to absence of timely notice and of proof of loss were without merit in the following colloquy:

> "MR. GREENGARD [Counsel for Respondent]: • • • Furthermore, there was no notice or proof of loss. But for the purposes of this argument, I will admit that the cases on waiver seem to state that notice and proof of loss requirements can be waived if you don't object to them.
>
> "THE COURT [Winner, D. J.]: I'm not very much impressed by any position that you take that you win this lawsuit because of failure to file proof of loss, in view of this letter. [Respondent's letter of December 16, 1970, denying Petitioner's claim.]
>
> "MR. GREENGARD: Yes, Your Honor, and that's why we are not arguing that.
>
> "THE COURT: I think we are pretty well excused from that."[7]

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and herein, the Petition should be granted.

Respectfully submitted,

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[7] Record, Vol. I at 11.